Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION,
Petitioner,
v.
UNITED STATES EX REL. MICHAEL A. HYATT,
Respondent.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, absent clear congressional intent, the repeal of a statutory provision that would have required the dismissal of a lawsuit and thereby provided a complete defense to the action, may be applied retroactively to a case in which all of the relevant conduct occurred—and the lawsuit was filed—before the repeal.

PARTIES TO THE PROCEEDINGS

Petitioner Northrop Grumman Corporation, named as "Northrop Corporation" in the proceedings below, is a publicly traded corporation. Northrop currently has no parent corporation, nor does it have any nonwholly owned subsidiaries.

Respondent Michael A. Hyatt filed this action in the district court in the name of the United States, as required by 31 U.S.C. § 3730(b)(1). The United States government elected not to intervene in the action pursuant to 31 U.S.C. § 3730(b)(2). Instead, acting as an *amicus curiae*, the government submitted a memorandum in the district court arguing that the action against petitioner must be dismissed. The government did not participate in this case in the Court of Appeals.

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Petitioner Northrop Grumman Corporation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-17a) is reported at 80 F.3d 1425. The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc (App., *infra*, 34a) is unpublished. The order of the district court dismissing respondent's *qui tam* claims (App., *infra*, 18a-22a) is unpublished. In its order, the district court adopted the reasoning contained in an unpublished order of the United States District Court for the Northern District of California. App., *infra*, 20a. The Northern District order (App., *infra*,

24a-33a) was attached as an exhibit to petitioner's memorandum in support of the government's suggestion of dismissal. App., *infra*, 23a.

JURISDICTION

The Court of Appeals entered its judgment on April 11, 1996. App., *infra*, 1a. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on May 28, 1996. App., *infra*, 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provision of the False Claims Act (FCA), 31 U.S.C. § 3730, was amended on October 27, 1986. The pre-amendment version of § 3730 is reprinted in its entirety in Appendix E to this Petition. App., *infra*, 35a-36a. The current version of § 3730 is reprinted in its entirety in Appendix F to this Petition. App., *infra*, 37a-44a.

STATEMENT OF THE CASE

In October 1985, respondent Michael Hyatt, then a Northrop employee, contacted the Air Force Office of Special Investigation and accused Northrop of producing defective inertial measurement units (IMUs) in connection with the MX missile program. Northrop's C.A. Excerpts of Record (E.R.) 31, 94. The government conducted an investigation, interviewed Hyatt at length, and concluded that the allegations of "fraud" were meritless. E.R. 70-71, 78-79, 81-83. Although certain problems had predictably arisen during the development of the highly complex IMUs, the government concluded that Northrop had done nothing to conceal them: As one of the investigating officers commented, "the problems Mr. Hyatt raised were known to the Air Force and were of the type routinely expected in a

development contract." E.R. 82; *see also* E.R. 78-79, 272. The government's conclusions were memorialized in two reports prepared by the Air Force in April and June 1986. E.R. 32, 82-83.

Also in 1985, the government learned of allegations that Northrop had improperly stored certain components. Both the government and Northrop investigated these allegations, and Northrop reported the conclusions of its internal investigation to the government. E.R. 32-33. In 1986, the government also conducted an independent investigation into alleged problems with the testing of certain "heat exchangers" used in the IMUs. Northrop also investigated this issue and disclosed its internal investigative report to the government in July 1986. E.R. 33-34, 85-87.

On October 3, 1986, respondent (who had been discharged by Northrop in May 1986) and his co-relator John W. King filed in the district court a complaint against Northrop in which they asserted, *inter alia*, a *qui tam* claim under the FCA based on the allegedly defective IMUs, improper storage of components, and failure adequately to test the heat exchangers. E.R. 9-16.[1] After reviewing the complaint, the government formally declined to exercise its right, under 31 U.S.C. § 3730(b)(2), to intervene in and

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[1] The *qui tam* provisions of the FCA authorize a private citizen (the "relator") to bring a civil action on behalf of himself and the United States for a violation of the statute. 31 U.S.C. § 3730(b)(1). (The term "*qui tam*" literally means "who as well." *See Black's Law Dictionary* 1251 (6th ed. 1990).) The relator is generally entitled to receive a portion of any recovery obtained in the suit, although the respective rights of the relator and the government in this regard are different under the pre-1986 version of the FCA than under the amended version that was enacted that year. *Compare* 31 U.S.C. § 3730(c) (1982) *with* 31 U.S.C. § 3730(d) (1988).

conduct the suit. E.R. 29.[2] Instead, acting as an *amicus curiae*, the government suggested that, because the allegations were known to the United States at the time the action was filed, the district court was *required* to dismiss the FCA claim under 31 U.S.C. § 3730(b)(4) (1982), which provided that a *qui tam* action shall be dismissed if it is " 'based on evidence or information the Government had when the action was brought.' " E.R. 29 n.2 (quoting the statute); *see also* App., *infra*, 3a.

In its district court papers, the government noted that § 3730 had been completely rewritten by the FCA amendments that were enacted on October 27, 1986, *after* the complaint was filed. E.R. 37-42 (citing the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (Oct. 27, 1986)). Specifically, the new § 3730 eliminated the above-described "prior government knowledge" defense to a *qui tam* action, and instead barred only those actions based on *publicly* disclosed allegations. 31 U.S.C. § 3730(e)(4) (1988). For two reasons, however, the government argued that these amendments could not be applied retrospectively to Hyatt's complaint and that the district court therefore "lack[ed] jurisdiction" over the complaint. ER 29; *id.* at 57-66.

First, the government noted that the lifting of the "prior government knowledge" bar on *qui tam* suits was part of a carefully crafted compromise in which Congress simultaneously expanded the rights of *qui tam* relators while imposing

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[2]The government filed an independent FCA action on its own behalf raising the heat exchanger issue. E.R. 148, 302. (The government expressly noted in the district court that, as to the heat exchanger issue, neither Hyatt nor his co-relator in this suit had provided any "information whatsoever." E.R. 33-34.) The government's FCA suit was voluntarily dismissed after Northrop agreed to make a $45,050 adjustment to the contract price. E.R 300-07. In the agreement, Northrop expressly denied any wrongdoing in connection with these allegations. E.R. 305.

new conditions on the exercise of those rights, such as, for example, a new requirement that all *qui tam* complaints be filed initially under seal and *in camera*. E.R. 58-61. Because these counterbalanced provisions of § 3730 were not severable from one another, and because they could not *all* be applied retroactively (the complaint having already been filed publicly), the government argued that "the obligations and rights of the parties, as they existed when the suit was filed, should be enforced." E.R. 61.

Second, the government noted that retroactive application of the amended § 3730 "would interfere with matured rights." E.R. 61. Specifically, the government contended that "the lifting of the jurisdictional bar would result, if the relators are successful, in depriving the government of its right to 100% of the recovery based on allegations previously known to the government." E.R. 64-65. The government argued that, although it had declined to participate in respondent's *qui tam* suit, it could choose later to institute its own suit based on these allegations and that "[w]hatever recovery resulted [would be] the government's alone." E.R. 65.[3]

Respondent opposed the government's suggestion of dismissal, arguing that the "*lack* of Congressional intent to apply the statutory Amendments prospectively only" meant that the new § 3730 should be applied retroactively to save this action. E.R. 102 (emphasis added); *see id.* at 88-124. Northrop supported dismissal, arguing that application of the amended version of the FCA would abridge its substantive rights by depriving it of the previously available affirmative defense of "prior government knowledge." ER 139-74.

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[3] At approximately the same time that the government suggested dismissal of respondent's *qui tam* suit, the government filed its own FCA action limited to the "heat exchanger" issue. *See* note 2 *supra*.

The district court dismissed the *qui tam* claim, concluding that Congress' elimination of the prior government knowledge defense in the amended § 3730 could not be applied retroactively. In reaching this conclusion, the district court expressly adopted the reasoning in the unpublished order in *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613 (N.D. Cal. Sept. 8, 1987). App., *infra*, 20a. The *Boisvert* order, which had been submitted by petitioner in its district court papers, held that the amended § 3730 could not be applied retroactively because to do so would take away "material defenses." App., *infra*, 28a. *Boisvert* rejected the argument that the amended § 3730 was merely a "procedural" statute that could be applied retroactively, instead holding that the prior government knowledge bar was a "material" defense because, *inter alia*, "[b]y disclosing the pertinent information to the government, [the contractor], under the law in existence at the time, would have foreclosed any claim based on that information." *Id.* at 31a.

The Ninth Circuit reversed on this issue. App., *infra*, 5a-10a. Its retroactivity holding was based on a two-step analysis. First, the court noted that the Ninth Circuit had twice retroactively applied the amended version of § 3730 to cases in which the underlying conduct took place before the date of enactment, but in which the complaint was filed after that date. *Id.* at 6a-8a (citing *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (Feb. 15, 1996) (No. 95-1340)). Consistent with its earlier decisions in *Lindenthal* and *Schumer*, the Court of Appeals held that application of the amended version of § 3730 would not have a "retroactive effect" within the meaning of this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). The court

reasoned that the amended § 3730 would not alter the "underlying liability" of the contractor, App., *infra*, 6a-7a, and that, in any event, the new statute was a "jurisdictional" provision that must be presumed to apply retroactively. *Id.* at 7a.

Second, the panel concluded that a different result was not required where, as here, the complaint was filed before the enactment of the amendments. App., *infra*, 7a-10a. The court rejected Northrop's argument (initially made in the district court by the government) that the amended § 3730 was intended to operate as an integrated whole, and that, because portions of that section (such as the new requirement of initially filing under seal) obviously could not be applied retroactively, none of the *qui tam* amendments could be applied to an action that had already been filed. *Id.* at 8a-10a. The Ninth Circuit concluded that, because this Court in *Landgraf* had applied a section-by-section retroactivity analysis to the Civil Rights Act of 1991, a similar approach was warranted here. *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's conclusion that the amended version of § 3730 could be applied retroactively to revive a lawsuit that was barred under the law in effect at the time the suit was filed cannot be squared with this Court's decision in *Landgraf*. Moreover, the Ninth Circuit's holding in this case is directly contrary to a decision of the Sixth Circuit on this precise issue. Thus, had this lawsuit been filed in the Sixth Circuit, rather than the Ninth Circuit, it would have been dismissed. Review should be granted to resolve the conflict with respect to this important question.

A. The Ninth Circuit's Ruling Is Inconsistent With This Court's Decision in *Landgraf*

In *Landgraf*, this Court held that, absent clear congressional intent, a statute should not be applied to have retroactive effect. 114 S. Ct. at 1505. A statute has a "retroactive effect" in a particular context if its application would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* In short, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499. Application of these principles makes clear that the amended § 3730, by eliminating the "prior government knowledge defense," has a retroactive effect within the meaning of *Landgraf*.

In order to determine whether a subsequently enacted federal statute would attach new consequences to pre-enactment conduct, one must first identify the relevant conduct that would be affected by the application of the new statute. *Landgraf*, 114 S. Ct. at 1499, 1505; *id.* at 1524 (Scalia, J., concurring in the judgment) (stating that the "critical issue" is "what is the relevant activity that the rule regulates"); *see also United States ex rel. Anderson v. Northern Telecom, Inc*, 52 F.3d 810, 814 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 700 (1996). Here, the conduct that is affected by the amendment of § 3730 is the disclosure of information to the government. *Id.* That is, prior to its amendment, § 3730 attached an important legal consequence to the fact that the government had knowledge of a particular FCA allegation — a *qui tam* suit based on that allegation was completely barred, even if the *qui tam* relator was the source of the government's prior knowledge. 31 U.S.C. § 3730(b)(4) (1982); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103-06 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d

668, 669-73 (9th Cir. 1978). Moreover, by precluding *qui tam* liability for any conduct that was known to the government, § 3730 provided a significant additional incentive for federal contractors to make full, voluntary disclosures to the government. *See* Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?*, 18 Pub. Cont. L.J. 469, 481 (1989) ("Under the old law, a contractor could disclose the pertinent information about the fraud and foreclose the bringing of a claim by a relator."). Thus, a contractor could avoid the burden of a strike suit brought by a disgruntled *qui tam* relator simply by doing what Northrop did in this case — keeping the government informed about routine problems arising during performance under the contract, conducting internal investigations when specific issues arose, and disclosing the results of such investigations to the government.

The new § 3730 significantly alters the legal consequences of the government's prior knowledge in two important respects: (1) it no longer bars *qui tam* suits based on allegations known to the government at the time the suit was filed; and (2) if the allegations have been "public[ly] disclos[ed]," then only an "original source" of the allegations may bring a *qui tam* suit, and any such putative relator is *required* to disclose the allegations to the government *before* bringing suit. 31 U.S.C. § 3730(e)(4) (1988). In view of these changes, application of the amended § 3730 would have the retroactive effect of attaching new legal consequences to pre-enactment conduct in any case where the government acquired its knowledge of the relevant allegations before the new statute was enacted.

This analysis makes clear that the amended § 3730 would have a retroactive effect in the instant case. Here, the disclosures made to the government by both Northrop and Hyatt occurred well before the amendment of the FCA. Indeed, the record reveals that the government already was

aware of the various problems with the IMUs at the time that Hyatt reported them in 1985. Accordingly, under the version of the FCA in effect at the time the government acquired this knowledge, Hyatt's *qui tam* action was unquestionably barred. 31 U.S.C. § 3730(b)(4) (1982); *Dean*, 729 F.2d at 1103-06; *Pettis*, 577 F.2d at 669-73. Application of the amended version of the FCA would lift this bar and permit Hyatt's *qui tam* suit, thereby "attach[ing] new legal consequences to events completed before its enactment." *Landgraf*, 114 S. Ct. at 1499. As such, the new statute would have a "retroactive effect" and must not be applied absent clear congressional intent.[4]

The Court of Appeals did not dispute that application of the amended § 3730 significantly altered the legal consequences of the pre-amendment disclosures of information to the government. Nonetheless, the court held that retroactive application was compelled by the Ninth Circuit's earlier decisions in *Lindenthal* and *Schumer*, both of which had retrospectively applied the amended § 3730 to eliminate the "prior government knowledge" defense, even though in both cases the government had known of the allegations prior to the amendment of the statute. App., *infra*, 6a-8a; *see also Schumer*, 63 F.3d at 1517 & n.1; *Lindenthal*, 61 F.3d at 1408. Relying on these decisions, the court concluded that there was no "retroactive effect" within the meaning of *Landgraf*. The court gave two reasons for its conclusion, but neither withstands analysis.

First, the Ninth Circuit concluded that application of the amended version of § 3730 would not have a retroactive effect because it would not alter the underlying liability of the contractor. App., *infra*, 7a. This argument is flatly

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[4] As the Ninth Circuit conceded in its opinion in this case, "Congress has not expressly indicated whether the 1986 amendments to the FCA apply retrospectively to complaints filed prior to the enactment of the amendments." App., *infra*, 6a.

inconsistent with *Landgraf*, which makes clear that an alteration of the underlying substantive obligation is not the only way in which a new statute may have a retroactive effect. Such an effect exists if application of the statute would "impair rights a party possessed when he acted, increase a party's liability for past conduct, *or* impose new duties with respect to transactions already completed." 114 S. Ct. at 1505 (emphasis added). Thus, even if the underlying obligation is not altered, a new statute will still have a retroactive effect if it increases a party's liability for past conduct or impairs a party's pre-existing rights. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 (1994) (noting that, because § 102 of the Civil Rights Act of 1991 expanded the applicable monetary liability, it could not be applied retroactively even though "it did not alter the normative scope of Title VII's prohibition on workplace discrimination").

Application of the amended § 3730 has both of these retroactive effects: By reviving a barred cause of action, it eliminates a complete defense, thereby impairing Northrop's pre-existing rights and increasing its liability.[5] Thus, even if the amended § 3730 is construed as merely "giv[ing] a more efficient and a more complete remedy" for enforcing a

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[5]The revival of Hyatt's barred action is, for example, no less retroactive in its practical effect than the revival of a claim that is barred by the defense of limitations, and it is well established that, absent clear congressional intent, an amended statute of limitations "may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme." *Chenault v. United States Postal Service*, 37 F.3d 535, 538 (9th Cir. 1994); *see also United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); *Herm v. Stafford*, 663 F.2d 669, 683 & n.20 (6th Cir. 1981); *cf. International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (plain language of new provision expressed Congress' intent to revive time-barred actions then pending before the EEOC).

pre-existing duty, the statute must not be applied retroactively where, as here, doing so would "tak[e] away material defenses, — defenses which did something more than resist the remedy; they disproved the right of action." *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 301-02 (1913).[6]

Second, the Ninth Circuit held that the new version of § 3730 fell within *Landgraf's* exception for "jurisdictional" rules. App., *infra*, 7a; *see also Schumer*, 63 F.3d at 1517; *Lindenthal*, 61 F.3d at 1408. But *Landgraf* did not establish a *per se* rule that all "jurisdictional" statutes apply retroactively to pending cases; rather, the Court noted that "[p]resent law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court *rather than to the rights or obligations of the parties.*' " 114 S. Ct. at 1502 (quoting *Republic National Bank v. United States*, 506 U.S. 80, 100 (1992)(Thomas, J., concurring)) (emphasis added). That is, in the ordinary case, a new jurisdictional rule may be applied retroactively because doing so "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* (quoting *Hallo-*

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[6]The Ninth Circuit similarly erred in suggesting that the new *qui tam* provisions have no retroactive effect because the underlying liability could also be enforced through "an action brought directly by the government." App., *infra*, 7a. In the instant case, the government conducted an extensive pre-filing review of Hyatt's allegations, found them to be meritless, and declined to pursue them. E.R. 70-71, 78-79, 81-83. By reviving Hyatt's barred *qui tam* claim, application of the new § 3730 would thus clearly affect Northrop's liability because it is the *sole* determinant of whether Northrop will be haled into court in this case. Indeed, the Ninth Circuit's view would lead to the astonishing conclusion that there would be no "retroactive effect" were Congress retrospectively to create brand new *qui tam* causes of action to enforce pre-existing obligations under *other* federal statutes. Moreover, the Ninth Circuit completely ignored the fact that, as noted by the government in the district court, retrospective application of the new § 3730 significantly alters the *government's* pre-existing rights under the FCA. E.R. 63.

well v. Commons, 239 U.S. 506, 508 (1916)). *Landgraf* thus makes clear that its "jurisdictional" exception extends only to those statutes that change the relevant tribunal without extinguishing substantive rights altogether. Indeed, every case cited by *Landgraf* as involving a "jurisdictional" amendment is consistent with that rule.[7]

In the instant case, the amended § 3730 does not reassign a claim from one tribunal to another without extinguishing substantive rights; on the contrary, it eliminates a prior defense and substitutes a new one. Accordingly, even assuming *arguendo* that § 3730 *is* in fact a "jurisdictional" provision, the Ninth Circuit erred in concluding that it could be applied retroactively.

In any event, the Ninth Circuit was also wrong in concluding that the relevant subsection of the amended § 3730 was a "jurisdictional" provision within the meaning of *Landgraf*. The court based this conclusion on the mere fact that the subsection uses the term "jurisdiction." App., *infra*, 7a;

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[7] *See Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-08 n.6 (1978) (although prior basis for jurisdiction was held invalid by this Court in 1977, a 1976 statute could be applied to save jurisdiction over suit, which "appeared jurisdictionally correct when filed"); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (retroactively applying new statute that added State to list of persons who could be sued, but action was only for prospective relief); *Bruner v. United States*, 343 U.S. 112, 117 (1952) (change of law "has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (statutory reassignment of claim from judicial to administrative forum "takes away no substantive right, but simply changes the tribunal that is to hear the case"); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899) (statute granting new appellate rights did not "destro[y] any vested right" and language of the statute required it to be applied retrospectively); *The Assessor v. Osbornes*, 9 Wall. (76 U.S.) 567, 572-75 (1870) (repeal of federal jurisdiction over certain tax actions meant that such suits "must be commenced in the State Courts").

see also Schumer, 63 F.3d at 1517; *Lindenthal*, 61 F.3d at 1408. This analysis is clearly deficient. Congress routinely expresses limitations on causes of actions or on available forms of relief in jurisdictional terms, but that does not imply that such provisions "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 114 S. Ct. at 1502.[8] Thus, for example, if Congress repealed a statute stating that "no court shall have jurisdiction to award punitive damages" and instead enacted a statute conferring such "jurisdiction," the resulting increase in the extent of the defendant's liability clearly would constitute a "retroactive effect" under *Landgraf*. *See* 114 S. Ct. at 1505-07. In short, what matters under *Landgraf* is not whether Congress used the magic word "jurisdiction"; what matters is whether the statute merely regulates the authority of particular courts or whether it also creates or destroys substantive rights. *Cf. Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 (D.C. Cir. 1986) (R.B. Ginsburg, J., dissenting) (criticizing the "profligate use of the term 'jurisdiction' " to mean many different things, and cautioning that the tendency to assume it means the same thing in every context "has all the tenacity of original sin and must constantly be guarded against") (citation and internal quotation marks omitted). Here, despite the use of "jurisdictional" language, the amended § 3730 addresses, not the authority of courts,

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[8] *See, e.g.*, 8 U.S.C. § 1105a(d)(2) ("No court shall have jurisdiction to review any issue other than an issue described in paragraph (1)"); 15 U.S.C. § 717z(g)(1) ("Except as provided in paragraph (2), no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued under this section . . . ."); 25 U.S.C. § 1772f(b) ("[T]he court shall not have jurisdiction to award money damages against the State, the district or the tribe."); 26 U.S.C. § 7426(b) ("The district court shall have jurisdiction to grant only the following forms of relief . . . .") (listing relief available).

but rather the respective substantive rights of the contractor, the *qui tam* relator, and the United States.

The panel also erred in concluding that *Landgraf* always requires a subsection-by-subsection retroactivity analysis. App., *infra*, 9a-10a. *Landgraf* applied such an approach only because it found "no special reason to think that all the diverse provisions of the [Civil Rights] Act must be treated uniformly for such purposes." 114 S. Ct. at 1505. The 1986 FCA amendments are quite different. As the government pointed out in the district court, E.R. 58-61, a selective retroactive application of only some elements of the amended § 3730 — whose language was the result of a carefully crafted compromise — would fail to acknowledge the limitations on the new rights conferred and would frustrate the interests Congress sought to protect in imposing those limitations.[9] *Cf. United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 162-63 (1914)

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[9] In its papers in the district court, the government explained the FCA amendments as follows:

> Subsection (b)(2) of section 3730 imposes new requirements that all *qui tam* actions "shall" be filed *in camera*, "shall" remain under seal for a period of at least 60 days, and "shall not" be served upon the defendant until the court so orders. 31 U.S.C.A. § 3730(b)(2) (1987 pocket part)....
>
> The legislative history indicates that this section was the subject of much concern, and that the final provisions adopted were the product of compromise between a perceived need to expand the *qui tam* rights and a fear that these provisions could be abused if left unchecked. *See generally* S. Rep. No. 345, 99th Cong., 2d Sess. 14, 16, and 24-25 (1986); *Cong. Rec.* S15036 (daily ed. October 3, 1986); *Cong. Rec.* H9388-9389 (daily ed. October 7, 1986). The protective provisions of subsection (b)(2), section 3730, were inserted to protect the government and the defendant. "The Committee feels that sealing the initial private civil false claims complaint *protects both the government and the defendant's interests* without harming those of the private relator." S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (emphasis added).

E.R. 58-59.

("the limitations upon [a newly created] liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself"). Thus, for example, because the under seal filing requirements cannot retroactively be satisfied, *see Landgraf*, 114 S. Ct. at 1502 n.29, no portion of § 3730 should be applied retrospectively. *See United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316-17 (1908) ("[W]e see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future."); *see also United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985).

Moreover, the fact that Congress expected the amended § 3730 to apply only prospectively to suits filed after enactment is further reflected by the very different incentive structure that it creates. Prior to the 1986 amendments, a *qui tam* plaintiff would lose his or her cause of action by disclosing the allegations to the government prior to filing suit, *see, e.g., Pettis*, 577 F.2d at 670-73, but under the amended § 3730, a *qui tam* plaintiff who is an "original source" of publicly disclosed allegations cannot bring suit *unless* the allegations were voluntarily disclosed to the government prior to the filing of the suit. 31 U.S.C. § 3730(e)(4)(B).

B. The Courts Of Appeals Are Divided On The Important Question Whether A New Statutory Provision, Such As The Amended FCA, Can Properly be Construed To Revive A Lawsuit That Was Barred Under Prior Law

The Sixth Circuit has reached a conclusion that is directly contrary to the Ninth Circuit's holding in this case. *See United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert.*

denied, 114 S. Ct. 1370 (1994). Review should be granted to resolve this clear circuit conflict.

The facts of *TRW* are indistinguishable in all material respects from those of the instant case. In April 1986, prior to the enactment of the FCA amendments, three TRW employees filed a *qui tam* action against TRW and other contractors, raising various allegations relating to the defendants' performance under certain contracts for military equipment. 4 F.3d at 420. The allegations were already known to the government, in large measure because TRW had disclosed the results of its own internal investigation. *Id.* at 419. The government intervened in the *qui tam* suit, filed an amended complaint that substantially narrowed the claims, stipulated that the *qui tam* relators would be barred from pursuing any of the claims alleged in the original complaint, and moved to preclude the relators from sharing in any recovery the government might obtain under the amended complaint. *Id.* at 420-21.[10] The district court entered orders granting these motions, agreeing with the government and the defendants that the amended § 3730 should not be applied retroactively. *Id.*

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[10]One difference between *TRW* and this case is that, in *TRW*, the internal investigation disclosed criminal wrongdoing that resulted in TRW's pleading guilty to several counts of conspiring to defraud the government. 4 F.3d at 419. Here, by contrast, there was no such wrongdoing: The government elected not to intervene in the *qui tam* action, which it believed (except for the "heat exchanger" issue) to be meritless, E.R. 70-71; and the government's independent action on the heat exchanger issue was voluntarily dismissed pursuant to an agreement in which Northrop expressly denied any wrongdoing. E.R. 305. This difference between the two cases is immaterial, however, because the pre-1986 version of § 3730 barred all *qui tam* suits based on allegations known to the government (regardless of their merit). Indeed, the distinction, if anything, cuts in Northrop's favor: If (as in *TRW*) the amended version of § 3730 cannot be applied retroactively to permit a *meritorious qui tam* suit, then surely it cannot be applied to permit the meritless suit filed here.

The Sixth Circuit affirmed. The court first noted that there was "no clear language in the amendments to the False Claims Act indicating whether courts should apply the amendments retroactively." 4 F.3d at 421. Reviewing this Court's pre-*Landgraf* cases, the Sixth Circuit then held that "where the statute does not clearly indicate that its provisions are retroactive," the applicable rule is that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 422 (citation and internal quotation marks omitted). Applying this standard, the court concluded that the amended § 3730 affected substantive rights and could not be applied retroactively: "The amendments *expand the circumstances under which citizens may bring false claims suits*, and give *qui tam* plaintiffs more rights to participate in the litigation and a greater share in the recovery." *Id.* (emphasis added). Accordingly, the Sixth Circuit squarely held that "the provisions that govern are those that were in effect at the time the conduct that is the subject of this litigation occurred." *Id.* at 423.[11]

In light of the Sixth Circuit's analysis, and its clear holding on the very same issue in a case with materially indistinguishable facts, it is beyond doubt that, had this case been filed in a district court within that circuit, it would have

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[11] In a footnote, the Sixth Circuit noted that this holding was somewhat broader than that which had been suggested by the district court in *TRW*, which had held that the " '*qui tam* provisions in effect *at the time this action was initiated* shall be the applicable law.' " 4 F.3d at 423 n.7 (quoting one of the district court's orders) (emphasis added by the Sixth Circuit). The difference was important to another portion of the *TRW* opinion, which applied the Sixth Circuit's broader holding in concluding that a second *qui tam* suit brought by the same relator *after* the amendments were enacted was also governed by the prior statute. 4 F.3d at 425-26. Under either rule, however, the result in the instant case would be exactly the same, because respondent's *qui tam* action was filed *before* the amendments were enacted. App., *infra*, 8a.

been dismissed.[12] Because it was filed in the Ninth Circuit, however, this lawsuit continues. This conflict among the circuits warrants this Court's intervention.[13]

C. The Petition In This Case Should Be Considered Together With The Petition In *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340

As noted earlier, one of the decisions relied upon by the Ninth Circuit in this case was that court's prior decision in *Schumer*. App., *infra*, 9a-10a ("*Schumer* compels our holding that [the amended § 3730] applies retrospectively. . . ."). On February 15, 1996, a petition for a writ of certiorari was filed in *Schumer* raising three different issues,

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[12] It is irrelevant that *TRW* was decided prior to this Court's decision in *Landgraf*. The standard employed by the Sixth Circuit — that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect" — is identical to that employed by this Court in *Landgraf*. *See* 114 S. Ct. at 1499-1505. Indeed, a petition for certiorari raising the retroactivity issue was filed in *TRW* after *Landgraf* had been argued, *see Eagleye v. TRW, Inc.*, 62 U.S.L.W. 3608 (1994) (No. 93-1204) (petition filed Jan. 19, 1994); however, rather than hold the petition in *TRW* pending the decision in *Landgraf*, this Court denied the petition only a month before issuing its opinion in *Landgraf*. *See Eagleye v. TRW, Inc.*, 114 S. Ct. 1370 (1994).

[13] In addition to resolving the specific conflict over the retroactivity of the 1986 FCA amendments, a grant of review in this case would help provide important guidance on the more general question whether a nominally "jurisdictional" statute that removes a complete defense to a suit can be applied retroactively. The Ninth Circuit's affirmative answer to that question in this case is inconsistent, for example, with the analysis employed by the Seventh Circuit in *Kimberlin*, 776 F.2d at 1347, which held that an amendment extending the time in which a district court could reduce a sentence could not be applied retroactively to a case in which the time allowed under the old rule had already expired: "An expansion of the court's jurisdiction *can* revive a claim, but the outcome is sufficiently unusual that the legislature should say so pretty clearly before a court will conclude that the statute produces this effect." *Id.* (emphasis in original).

the first of which challenges the Ninth Circuit's determination that the amended § 3730 may be applied retroactively. On May 28, 1996, this Court issued an order in *Schumer* inviting the Solicitor General to file a brief expressing the views of the United States concerning the case. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 116 S. Ct. 1845 (1996) (No. 95-1340). Given that the issue raised in this case is virtually identical to one of the issues raised in *Schumer*,[14] this Court may wish to consider the petition in the instant case together with the petition in *Schumer*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 1, 1996

Respectfully submitted,

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[14]The principal difference between the two cases is that in this case, unlike *Schumer*, the complaint was filed *before* the amendments took effect. App., *infra*, 8a. To the extent that this fact makes a difference, it suggests that the instant case is an even stronger one for *not* applying the amended statute retroactively.

APPENDIX A

No. 94-55578
No. 94-55638

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL A. HYATT, aka, Brian Hyatt,
Plaintiff-Appellant-Cross-Appellee,

UNITED STATES OF AMERICA, ex rel.
MICHAEL A. (BRIAN) HYATT and JOHN W. KING,
Plaintiff,

v.

NORTHROP CORPORATION,
Defendant-Appellee-Cross-Appellant.

Argued and Submitted, September 15, 1995 — Pasadena, California
Filed, April 11, 1996

Appeal from the United States District Court for the Central District of California. D.C. No. CV-86-06437-KN. David V. Kenyon, District Judge, Presiding.

COUNSEL: Philip J. Ganz, Jr., Laurie Susan Gorsline, Law Offices of Hardy L. Thomas, Los Angeles, California, and Linda R. MacLean and Phillip E. Benson, Law Offices of Phillip E. Benson, Newport Beach, California, for the plaintiff-appellant-cross-appellee.

Carolyn B. Kuhl and Marc A. Becker, Munger, Tolles & Olson, Los Angeles, California, for the defendant-appellee-cross-appellant.

Before: Thomas G. Nelson and Kleinfeld, Circuit Judges, and Wilken, District Judge.*

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* Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

T.G. NELSON, Circuit Judge:

OVERVIEW

Michael A. Hyatt, a former Northrop Corporation (Northrop) employee, brought suit against Northrop. Hyatt's claims included a *qui tam* action for violation of the False Claims Act (FCA) (31 U.S.C. § 3729 *et seq.*), a private action for violation of the FCA discharged employee protection provision (31 U.S.C. § 3730(h)), and four state law causes of action, including an action for wrongful discharge in violation of public policy and intentional infliction of emotional distress. The district court dismissed Hyatt's *qui tam* claim with prejudice and granted summary judgment for Northrop on Hyatt's FCA discharged employee protection claim. Hyatt proceeded to trial on his state law causes of action and received a judgment against Northrop on his state wrongful discharge claim.

Hyatt timely appeals the district court's dismissal of his *qui tam* claim, and grant of summary judgment for Northrop on his FCA discharged employee protection claim. Northrop cross-appeals the district court's denial of its summary judgment motion seeking dismissal of Hyatt's state wrongful discharge claim. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

A. The FCA Claim

Michael A. Hyatt was employed by Northrop from August 1981 until he was discharged on May 13, 1986. Hyatt filed the complaint in this case on October 3, 1986. On his own behalf, he alleged state law claims for wrongful discharge in violation of public policy and intentional inflic-

tion of emotional distress. On behalf of the Government, as a *qui tam* plaintiff, he asserted a cause of action against Northrop under the FCA.

After investigating the complaint, the Government informed the district court that it declined to intervene in the case to pursue the FCA claim pleaded by Hyatt. The Government also asked the court to dismiss the claim on the ground that it was barred by the "prior government knowledge" defense of the FCA, 31 U.S.C. § 3730(b)(4) (1982).

The district court dismissed Hyatt's FCA *qui tam* claim with prejudice, holding that the 1986 amendments to the FCA[1] did not apply retrospectively, that the Government had prior knowledge of the information underlying Hyatt's claims before his complaint was filed and that, because of the "prior government knowledge" defense, the court lacked jurisdiction over Hyatt's FCA claims.

B. The FCA Discharged Employee Protection Provision

At the time that Hyatt's original complaint was filed, the FCA did not include a discharged employee protection provision. However, the October 1986 amendments to the Act added subsection 3730(h), which provides a cause of action for employees who are retaliated against for actions taken "in furtherance of" a FCA action. 31 U.S.C. § 3730(h) (1986).

In 1987, Hyatt brought another action which added a claim under the new FCA discharged employee protection provision. The district court granted Northrop's motion for summary judgment on the FCA discharged employee protection claim, holding that § 3730(h) did not apply "to

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[1] The 1986 amendments to the FCA did not become effective until October 27, 1986, more than three weeks after Hyatt filed his original complaint.

Northrop's termination of Hyatt, because Northrop's action was taken before the new law took effect."

C. After-Acquired Evidence of Resume Fraud and the Wrongful Discharge Claim

On June 15, 1981, Hyatt completed an employment application for an engineering position at Northrop. The application form requested that the applicant list "all jobs during the past ten years" and to "account for all periods of military service and unemployment." It required that the applicant certify the truth of the information provided and informed the applicant that he would be "subject to dismissal at any time" if Northrop discovered that anything on the application was untrue.

During the discovery phase of the present case, Northrop discovered that Hyatt had made false representations on his employment application regarding his employment history. Northrop moved for partial summary judgment on Hyatt's state wrongful discharge claim, arguing that Hyatt's false representations on his employment application should bar his recovery. The district court denied Northrop's motion.

The case proceeded to trial on Hyatt's state claims for wrongful discharge and intentional infliction of emotional distress. On March 15, 1994, the jury ruled in Hyatt's favor on his state wrongful discharge claim, and found for Northrop on Hyatt's claim of intentional infliction of emotional distress.

On April 14, 1994, Hyatt filed an appeal of the district court's dismissal of his FCA *qui tam* claim and grant of summary judgment for Northrop on his FCA discharged employee protection claim. On April 28, 1994, Northrop filed a cross-appeal of the district court's denial of its motion for partial summary judgment on Hyatt's state law claim for wrongful discharge.

STANDARD OF REVIEW

A district court's decision on whether a statute may be applied retrospectively is a question of law to be reviewed *de novo*. *Chenault v. United States Postal Service*, 37 F.3d 535, 537 (9th Cir. 1994). A district court's interpretation of state law is reviewed under the same independent *de novo* standard. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).

ANALYSIS

A. Application of the Revised *Qui Tam* Provisions to a Complaint Filed Prior to Enactment of the 1986 Amendments

At issue in the present case is whether two specific provisions of the 1986 amendments to the FCA, 31 U.S.C. §§ 3730(e)(4)(A) and 3730(b)(2), can be applied retrospectively to a case in which the complaint was filed, and all the conduct at issue occurred, prior to the enactment of the amendments.

In *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994), the United States Supreme Court set out a three-step analysis to be used in determining whether "a federal statute enacted after the events in suit" should be applied retrospectively. First, the court must "determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so . . . there is no need to resort to judicial default rules." *Id.* However, where the statute does not contain such an express command, the court must "determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute in question would operate retroactively under this definition,

the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

In the present case, Congress has not expressly indicated whether the 1986 amendments to the FCA apply retrospectively to complaints filed prior to the enactment of the amendments. Therefore, we must determine whether application of the 1986 amendments to the present case would have a retroactive effect. If the amendments have a retroactive effect, the amendments cannot be applied retrospectively.

Prior to the 1986 amendments, *qui tam* actions were barred when "the action [was] based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982). The 1986 amendments significantly changed the *qui tam* provisions, such that "prior government knowledge" was no longer a defense to a *qui tam* action. *See* 31 U.S.C. § 3730(e)(4)(A) (1986).[2]

In *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1319 (1996), we addressed the issue of whether § 3730(e)(4)(A) of the 1986 amendments should be applied retrospectively to conduct which occurred before the amendment took effect. The Government in *Lindenthal* had the information which formed the basis of the claim prior to the enactment of the amendment, but the complaint was not filed until October 1989, after the amendment took effect. We held that the district court properly applied the new jurisdictional provision of § 3730(e)(4)(A) retrospectively. *Id.*

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[2] Title 31 U.S.C. § 3730(e)(4)(A) provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless . . . the person bringing the action is an original source of the information.

We went on to explain:

> The new jurisdictional provision does not impair any rights [the defendant] had when it acted, nor did the provision at issue increase [the defendant's] liability for past conduct, or impose new duties. This amendment relates to whether a *qui tam* relator can bring the action, not to whether [the defendant] is liable for the underlying fraud.

Id. (citing United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 814 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 700, 133 L.Ed.2d 657 (1996)).

We rejected the defendant's argument that the amendment does have a retroactive effect because it alters the defendant's rights by eliminating an "absolute defense." *Id.* "Proof that the government had the information when suit was brought was not an 'absolute defense' under the pre-amendment FCA. Rather, it was simply a jurisdictional defense to an action brought by a *qui tam* relator, as opposed to an action brought directly by the government." *Id.*

In *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (Feb. 15, 1996) (No. 95-1340), we again addressed the issue of whether § 3730(e)(4)(A) of the 1986 amendments should be applied retrospectively. Again, as in *Lindenthal*, the complaint was filed after the amendments were in effect. *Id.* We held that the amendment did not "infringe on the substantive rights of the defendant" and, thus, did not rebut the presumption that jurisdictional provisions will be applied retrospectively. *Id.* at 1517. Therefore, we applied § 3730(e)(4)(A) retrospectively. *Id.*

In the present case, as in *Lindenthal* and *Schumer*, the FCA claim involves actions which occurred before the 1986 amendments to the *qui tam* provisions were enacted. How-

ever, unlike *Lindenthal* and *Schumer*, the present case involves a complaint that was filed *prior* to the effective date of the 1986 amendments. Thus, the only issue to be decided by this court is whether the fact that a claim is filed before, instead of after, the 1986 amendments were enacted, distinguishes this case from *Lindenthal* and *Schumer*.

The 1986 amendments to the FCA added explicit filing and service requirements for *qui tam* relators. Section 3730(b)(2) (1986) provides:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government .... The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.

Hyatt filed his complaint prior to the effective date of the 1986 amendments. He did not file his complaint under seal, nor did he comply with the service requirements of § 3730(b)(2) (1986). If the 1986 amendments were applied retrospectively to Hyatt's complaint, his failure to comply with the filing and service requirements of the *qui tam* provisions would have a retroactive effect because it would impose new duties on Hyatt with respect to a complaint already filed. *See Landgraf*, 114 S.Ct. at 1505. Thus, we hold that § 3730(b)(2) of the 1986 amendments cannot be applied retrospectively to Hyatt's complaint which was filed prior to the effective date of the amendment. *See id.* at 1502 n.29 ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime ....").

This conclusion does not, however, end our inquiry. We must now determine whether the fact that § 3730(b)(2) cannot be applied retrospectively to the present case bars retrospective application of § 3730(e)(4)(A).

In *Landgraf*, 114 S.Ct. at 1489, the Court addressed the issue of whether the 1991 amendments to Title VII should be applied to conduct that occurred prior to enactment of the amendments. The Court stated that "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly" for purposes of determining whether it "should govern cases arising before its enactment." *Id.* at 1505. The Court found the instruction from Congress that the provisions were to " 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct." *Id.* The Court then analyzed three different subsections of the amendments, implying that the result of the analysis might be different for each. *Id.* at 1505-06. However, the Court held that none of the subsections could be applied retrospectively to the case before it. *Id.* at 1508.

In *Lindenthal*, 61 F.3d at 1408 n.6, we emphasized that our holding applied only to § 3730(e)(4)(A), and that "[t]he analysis might be different for other provisions of the 1986 amendments . . . ." Thus, we recognized that the different provisions of the 1986 amendments to the FCA must be analyzed independently to determine whether they could be applied retrospectively, and a finding that one provision could be applied retrospectively did not bar a finding that another provision could not.

In the present case, we have determined that § 3730(b)(2) (1986) cannot be applied retrospectively to a complaint filed prior to enactment of the amendments. However, because each provision of the 1986 amendments must be analyzed independently, this determination does not bar a finding that § 3730(e)(4)(A) may be applied retrospectively. *See Lindenthal*, 61 F.3d at 1408 n.6. *Schumer* compels our holding that § 3730(e)(4)(A) of the 1986

amendments applies retrospectively to conduct which occurred prior to the effective date of the amendments. Thus the district court erred in dismissing Hyatt's *qui tam* claim.

B. Retrospective Application of the FCA Discharged Employee Protection Provision

Prior to 1986, the FCA did not contain any provision for the protection of discharged employees. However, the 1986 amendments to the FCA included the addition of a discharged employee protection provision. This provision states:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA] . . . shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h).

Northrop terminated Hyatt on May 13, 1986, approximately six months before the FCA discharged employee protection provisions were enacted. The FCA does not expressly prescribe the proper reach of the § 3730(h) discharged employee protection provision. Thus, we must determine whether the discharged employee protection provision should be applied retrospectively. *See Landgraf*, 114 S.Ct. at 1505.

In granting Northrop's motion for summary judgment on Hyatt's FCA discharged employee protection claim, the district court found:

> [T]he Amendment created a new federal cause of action, or a new federal substantive right . . . . [B]efore § 3730(h) was enacted, an employee discharged for

> actions taken in furtherance of a whistleblower suit had no cause of action under federal law. Once § 3730(h) took effect, a new right was created—a right of an employee to bring suit in federal court based on retaliation by his employer for *qui tam*-related conduct. § 3730 did not merely expand the remedies available for actions that were already unlawful; instead, it defined additional conduct as unlawful (i.e., retaliatory discharge), and provided a remedy to a party aggrieved by such conduct. § 3730(h) is therefore inapplicable to Northrop's termination of Hyatt, because Northrop's action was taken before the new law took effect.

Applying the *Landgraf* definition of "retroactive effect" to the present case demonstrates that the district court was correct in its analysis. When Northrop made its decision to discharge Hyatt, the FCA included no discharged employee protections whatsoever; thus, even if Northrop did retaliate against Hyatt for disclosing information to the Government, at the time of Northrop's actions such conduct was technically "innocent" in the eyes of the federal law. Applying § 3730(h) retrospectively would therefore impair the right that Northrop had, under federal law, when it acted (i.e. to discharge Hyatt in retaliation); would increase Northrop's liability for past conduct (Northrop's conduct was legal at the time it acted, even if it discharged Hyatt in retaliation); and would impose new duties on Northrop with respect to actions already completed (at the time Northrop discharged Hyatt, it had no duty under federal law to not retaliate). *See Landgraf*, 114 S.Ct. at 1505. Therefore, we affirm the district court's holding that § 3730(h) should not be applied retrospectively to Northrop's termination of Hyatt.

Hyatt argues that although he may not be entitled to the purely compensatory forms of relief under § 3730(h), "his right to seek the prospective relief of reinstatement cannot be denied on retroactivity grounds . . . ." Because Hyatt is

raising his claim for reinstatement for the first time on appeal, we decline to review this issue. *In re Wind Power Systems, Inc.*, 841 F.2d 288, 290 n.1 (9th Cir. 1988).

C. Effect of After-Acquired Evidence of Resume Fraud on an Employee's Ability to Raise a State Wrongful Discharge Claim

The after-acquired evidence doctrine is a defense asserted by an employer to shield it from liability or to limit available relief where, after an employee is unlawfully terminated, the employer learns for the first time about employee misconduct or fraud that would have led to the discharge in any event. *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal.App.4th 620, 41 Cal.Rptr.2d 329, 335 (1995).

The California Supreme Court has not yet addressed the issue of whether after-acquired evidence will bar an employee's ability to raise a wrongful discharge claim. However, the United States Supreme Court has addressed the issue in the context of the Age Discrimination in Employment Act (ADEA), and two divisions of the California Court of Appeal have addressed the issue in the context of California state law.

In *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884, 130 L.Ed.2d 852 (1995), the Court held that after-acquired evidence of employee wrongdoing which would have resulted in discharge does not bar an employee from relief for wrongful discharge under the ADEA, but does limit the remedy. The Court reasoned that the ADEA was one part of an ongoing scheme aimed at eradicating discrimination in the workplace. *Id.* One of the objectives of this statute is deterrence, while another objective is to compensate for injuries caused by prohibited discrimination. *Id.* "The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA." *Id.* (citing *Alexander v.*

Gardner-Denver Co., 415 U.S. 36, 45, 94 S.Ct. 1011, 1018, 39 L.Ed.2d 147 (1974)). The Court went on to point out that if after-acquired evidence of employee wrongdoing were to bar all relief for a violation of the ADEA, the objectives of the ADEA would not be met. *Id.*

> The objectives of the ADEA are furthered when even a single employee establishes that an employer had discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important. . . .

Id. at 885.

In *Cooper v. Rykoff-Sexton, Inc.*, 24 Cal.App.4th 614, 29 Cal.Rptr.2d 642, 643 (1994), the California Court of Appeal for the Second District, Division 4, held that an employee's claims for age discrimination were not barred by after-acquired evidence of material omissions in the employment application. The court expressly declined "to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." *Id.*, 29 Cal.Rptr.2d at 644. The court instead took a fact-specific approach.

The employee in *Cooper* had performed his job satisfactorily for ten years. He was then fired for allegedly violating the company's rules requiring accurate record-keeping. *Id.* at 645. While being questioned at a deposition about his 1981 employment application, the employer learned of two falsifications regarding the employee's experience and employment history. The employer stated that had it known of the omissions and misrepresentations, it would not have hired the employee and would have fired the employee had the omissions and misrepresentations been discovered. *Id.*

The court stated:

> Although resume fraud is a serious social problem, so is termination of employment in violation of anti-discrimination laws. . . . Automatic forfeiture of all employment rights regardless of the circumstances can be too harsh a penalty in many cases. Where an employer has fired a worker in violation of a statutory ban on discrimination in the workplace, the purpose and effect of the anti-discrimination statutes are unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar any recovery.

Id. at 645.

In *Camp*, the California Court of Appeal for the Second District, Division 1, held that after-acquired evidence of employee misrepresentation was a bar to the employee's claim of wrongful discharge in violation of public policy. 41 Cal.Rptr.2d. at 340. The defendant in *Camp* was a contractor for an agency of the federal Government. As a condition of the contract, the defendant was required by law to periodically certify that "none of its employees had ever been convicted of a felony." *Id.* at 332.

Mr. and Mrs. Camp began working for the defendant in 1989 and 1990, respectively. *Id.* at 332. On each of their job applications, where they were asked if they had ever been convicted of a felony, they each answered "no." *Id.* In addition, they each submitted resumes which omitted any reference to a prior felony conviction and incarceration. *Id.* Mrs. Camp also signed a form that stated, under penalty of perjury, that she had not been convicted of a felony. *Id.*

In late 1990 and early 1991, Mrs. Camp reported that one of the partners of the defendant firm was engaged in insider trading. *Id.* Both Mr. and Mrs. Camp were fired in March 1991. *Id.* at 333. The Camps filed suit, claiming that the defendant's termination was wrongful in violation of

public policy. *Id.* During discovery, the defendant discovered that the Camps had both been convicted of a felony.

The *Camp* court began its analysis by reviewing the *Cooper* and *McKennon* decisions. The court then concluded that although the alleged statutory violation in the case before it was similar to the violations in *Cooper* and *McKennon*, "the nature of the Camps' misrepresentations and their potential detrimental impact on [the defendant] distinguish this case from prior decisions." *Camp*, 41 Cal.Rptr.2d. at 338.

The court pointed out that *Cooper* and *McKennon* both involved employee violation of the employer's voluntarily adopted policies. In contrast, the case before it involved misrepresentation of a job qualification imposed by the federal Government. *Camp*, 41 Cal.Rptr.2d. at 338. "The Camps' misrepresentations about their felony convictions went to the heart of their employment relationship with [the defendant].... [The defendant] was obligated by federal law to ensure that none of its employees had ever been convicted of a felony." *Id.* at 339.

Finally, the *Camp* court looked at the equities of the case. The court acknowledged that the facts in *McKennon* "presented a situation where balancing the equities should permit a finding of employer liability—to reinforce the importance of antidiscrimination laws—while limiting an employee's damages—to take account of an employer's business prerogatives." *Camp*, 41 Cal.Rptr.2d at 339. However, the court found:

> [T]he equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment.

Id.

The court went on to address the doctrine of "unclean hands":

> Since the Camps were not lawfully qualified for their jobs, they cannot be heard to complain that they improperly lost them. Given the nature of the misrepresentations, their potential damage to [the defendants], and the fact that the Camps were disqualified from employment by means of government requirements, the public policies of the state are adequately served by barring the Camps' claims. . . .

Id. at 340.

Based on the above cases, it appears that the California Supreme Court would make a fact-specific inquiry to determine whether Hyatt should be barred from recovering under the wrongful discharge statute. Thus, we will also use a fact-specific inquiry in addressing this issue.

Hyatt worked for Northrop for almost five years. It appears that his work performance was satisfactory until the allegations that lead [*sic*] to the current action were made. The misrepresentations that Hyatt made on his resume do not appear to have affected his work performance, and his misrepresentations did not cause any potential damage to Northrop.

As the *Cooper* court recognized, resume fraud is a serious problem. 29 Cal.Rptr.2d at 645. However, termination in violation of public policy is also a serious problem. If Northrop fired Hyatt in violation of the wrongful discharge statute, the purpose and effect of the statute would be unacceptably undermined by a rule that would allow the resume fraud, a fact that played no part in the decision to terminate, to bar any recovery.

Thus, we hold that Hyatt is not barred from asserting his state wrongful discharge claim and that, therefore, the

district court did not err in denying Northrop's motion for summary judgment on this issue.[3]

CONCLUSION

We affirm the district court's grant of summary judgment for Northrop on Hyatt's claim under the FCA discharged employee protection provision, 31 U.S.C. § 3730(h). We also affirm the district court's denial of Northrop's motion for summary judgment on Hyatt's state wrongful discharge claim. However, we reverse the district court's dismissal of Hyatt's FCA *qui tam* claim, and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part and REMANDED.

Costs are awarded to appellant and cross-appellee Hyatt.

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[3] After the judgment was entered, Northrop filed a motion to alter or amend the judgment to limit the back-pay remedy to the time period from the date of discharge until the date Northrop discovered Hyatt's misrepresentations. The district court denied the motion on the basis that Northrop should have raised it in the motion for summary judgment or in a requested jury instruction. The district court did not abuse its discretion in rejecting Northrop's post-trial motion, since the motion was late and also, as the district court noted, it had no basis in the verdict on which to reduce Hyatt's recovery.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. (BRIAN) HYATT, individually,
UNITED STATES ex rel.
MICHAEL A. (BRIAN) HYATT
and JOHN W. KING,
Plaintiffs,

v.

NORTHROP CORPORATION,
a California Corporation,
Defendant.

CV-86-6437-KN

ORDER

The Court has received the Declination of Appearance by the United States and Suggestion of Lack of Jurisdiction[.] Pursuant to 31 U.S.C. § 3730(b)(4), the papers filed by defendant Northrop Corporation ("Northrop") in support of the government's position and the papers filed by plaintiffs in opposition to the government's position. The Court HEREBY DISMISSES WITH PREJUDICE plaintiffs' third cause of action for violation of the False Claims Act (31 U.S.C. § 3729 *et seq.)*.

There are two major issues before the Court: 1) whether plaintiffs' complaint is based upon information known to the United States prior to the filing of the complaint and, if so, 2) whether the *qui tam* provisions of the 1986 amendments ("the amendments") to the False Claims Act should be applied retroactively to cases, such as this case, filed before October 27, 1986, the effective date of the amendments.

1. WHETHER PLAINTIFFS' COMPLAINT IS BASED ON INFORMATION KNOWN TO THE UNITED STATES PRIOR TO THE FILING OF THE COMPLAINT

Plaintiffs' complaint, filed on October 3, 1986, includes three causes of action — for wrongful termination and intentional infliction of emotional distress by plaintiff Hyatt individually and for violation of the False Claims Act by plaintiffs Hyatt and King as relators on behalf of the United States. Pursuant to 31 U.S.C. § 3730(b)(4), this Court must dismiss a *qui tam* action if the action is based on "evidence or information the Government had when the action was brought." The language of the statute is clear that dismissal by this Court is mandatory if the Government declines to proceed with the action and the Court finds that the Government had prior knowledge of the information that serves as the basis for plaintiffs' third cause of action. Because the Government has decided not to take over the relators' case and because the Court finds that the action is substantially based on evidence or information known by the Government since 1985, the Court finds that it lacks jurisdiction over plaintiffs' third cause of action and, therefore, dismisses it with prejudice.

Plaintiffs' allegations that Northrop violated the False Claims Act concern the design, development, and manufacture by Northrop of the Inertial Measurement Unit for the MX missile program. The Court has examined the relevant supporting evidence submitted by the parties in support of their respective positions and concludes that the Government had prior knowledge of plaintiffs' allegations before the complaint was filed. Plaintiffs appear to concede this point because their Memorandum in Opposition to the United States Suggestion of Lack of Jurisdiction Pursuant to 31 U.S.C. § 3730(b)(4) ("opposition") only addresses the issue in passing by reference to ¶¶ 23 and 24 of the

complaint. Opposition at 2. Plaintiffs offer no convincing evidence that counters the United States['] contention that it knew of the allegations since 1985. Much of plaintiffs' "evidence" consists of a critique of the investigation conducted by the Government, not a refutation of the Government's position that it had prior knowledge. The Court notes that the test is simply the prior knowledge of the Government, and the prior knowledge does not have to be a mirror image of the information allegedly known by the relators. *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 674 (9th Cir. 1978).

2. WHETHER THE *QUI TAM* PROVISIONS OF THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT SHOULD BE APPLIED RETROACTIVELY

In 1986 Congress overhauled the False Claims Act and, among other things, eliminated the "prior Government knowledge" defense available to a defendant. Plaintiffs argue that the amendments should be retroactively applied to this case. The Court is not persuaded by any of the arguments offered by plaintiffs in support of retroactive application and instead adopts the reasoning expressed by the Honorable William A. Ingram in *United States of America ex rel. Henry Boisvert v. FMC Corporation*, case no. C-86-20613 (N.D. Cal. September 8, 1987). In further support of their opposition, plaintiffs submitted a Supplemental Memorandum in Opposition to the United States Suggestion of Lack of Jurisdiction Pursuant to 31 U.S.C. § 3730(b)(4), which consisted of exerpts from statements made in the United States House of Representatives on November 3, 1987 by Congressmen Glickman and Berman. In reviewing the complete transcript of the proceedings in the Congressional Record, it is clear that the Congressmen were not concerned about the retroactive application of the amendments to cases filed before the effective date of the

amendments. In particular, Congressman Berman explained that

> . . . it is clear that we intended the 1986 amendments in all respects to apply to cases challenging preamendment conduct. In addition, it should be noted that these are cases filed after the date of enactment of these amendments, but in which the fraudulent schemes began prior to October 27, 1986.

133 *Cong. Rec.* H9515 (November 3, 1987), Northrop's Memorandum in Response to Plaintiffs' Supplemental Memorandum in Opposition to Motion to Dismiss, Exhibit A. Plaintiffs' complaint was filed before the date of enactment of the amendments. Whatever light the comments of the Congressmen may cast on Congress' intent, the Court finds that these comments have no relevance to this case.

3. PENDENT JURISDICTION OVER PLAINTIFF HYATT'S STATE LAW CLAIMS

Plaintiffs alleged federal question jurisdiction pursuant to 31 U.S.C. § 3729 *et seq.* over their third cause of action and pendent jurisdiction over the first and second causes of action. An independent basis of jurisdiction does not exist for plaintiff Hyatt's state law claims. Because the Court has dismissed plaintiffs' federal claim, the Court must now decide whether to exercise its discretion and assert pendent jurisdiction over plaintiff Hyatt's claims or dismiss these claims without prejudice.

The Court requests that plaintiff Hyatt and defendant Northrop submit short briefs on this issue on or before April 15, 1988.

IT IS SO ORDERED.

DATED: March 31, 1988

/s/
DAVID V. KENYON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. (BRIAN) HYATT, individually;
UNITED STATES ex rel.
MICHAEL A. (BRIAN) HYATT and JOHN W. KING
under 31 U.S.C. §§ 3729, *et seq.*,
Plaintiffs.

VS.

NORTHROP CORPORATION,
a California Corporation,
Defendant.

CASE NO. CV-86-6437-KN(Kx)

MEMORANDUM OF NORTHROP CORPORATION IN SUPPORT OF THE GOVERNMENT'S SUGGESTION OF DISMISSAL PURSUANT TO 31 U.S.C. § 3730(b)(4)

[TEXT OF MEMORANDUM OMITTED; "EXHIBIT A" TO MEMORANDUM FOLLOWS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA EX REL. HENRY BOISVERT,
Plaintiff,

v.

FMC CORPORATION,
Defendants.

No. C-86-20613 WAI

ORDER

Defendants' motion to dismiss is GRANTED.

This action was filed on September 9, 1986, under the federal Civil False Claims Act. 31 U.S.C. § 3729 *et seq.* The law was completely revised and amended effective October 27, 1986, after the filing of plaintiff's complaint. The amendments were contained in the False Claims Amendment Act of 1986. Public Law No. 99-562. 100 Stat. 3153.

Both the old law and the new amendments contain provisions under which a relator can bring suit on behalf of the United States, otherwise known as Qui Tam provisions. The 1986 amendments completely overhauled the old law. Damages for violations were increased. The provisions of the old law requiring knowledge and an intent to violate were softened so that it is now easier to find a violation. The burden of proof was lessened from clear and convincing evidence to a preponderance of the evidence. Certain jurisdictional changes were made, and the reward to a relator was increased.

In addition, the 1986 amendments completely changed the Qui Tam provisions pertaining to relators, that it [*sic*] in the manner in which the relator could bring a case. However, as part of the changes in the Qui Tam provisions, a

defense with respect to the knowledge of the United States, which previously existed under the old law, was negated.

Boisvert, the relator, has sued FMC on behalf of the United States alleging in his First Amended Complaint 32 instances of alleged false claims by FMC against the U.S. in connection with the production of the Bradley Fighting Vehicle.

Defendant FMC has filed a motion to dismiss 20 of the claims since each of them was allegedly known to the government before the action was filed. FMC relies on 31 U.S.C. § 3730(b)(4), of the old law which read:

> Unless the Government proceeds with the action, the Court shall dismiss an action brought by the person on discovering the action is based on information the Government had when the action was brought.

Plaintiff does not contend, at least for purposes of this motion, that the government did not have the information prior to the bringing of the suit. Instead, plaintiff maintains that the old law should not apply in this instance, but rather the 1986 amendments should be retroactively applied for purposes of this motion. Under the new amendments, suit by a relator is not barred because it is based on information given by the defendant to the government, or because the government happens to have the information. Rather, under the new amendments, a suit by a relator is barred if it is (i) based on allegations already the subject of a civil suit in which the U.S. is a party, (ii) if it is based on public disclosure of information in a criminal, civil or administrative hearing, (iii) if it is based on information in a Congressional or Government Account Office Report or hearing, (iv) or is based on news media report unless the relator is the source of the news report. These new provisions would not provide FMC with a defense since the relator's suit is not based on allegations from any of these sources.

Plaintiff contends that all provisions of the new law should be applied retroactively to this case. Defendant FMC, on the other hand maintains that the provisions of the 1986 amendments should be applied prospectively only. It seeks to obtain its defense of the United States' knowledge, which was available under the old law.

The United States has filed an *amicus curiae* brief on this issue. The United States argues that, while most provisions of the 1986 amendments should be applied retroactively to the existing litigation, the Qui Tam provisions should not be so applied. Such retroactive application would bar existing suits of relator plaintiffs who had met the provisions of the old law but not those of the 1986 amendments.

RETROACTIVE APPLICATION OF THE NEW AMENDMENTS

There are conflicting considerations, on the issue of retroactivity, which are difficult to reconcile. The remedial nature of the amendments must be balanced with the loss of the defense that existed under the old law. It appears, however, that the weight of the authority in the Supreme Court decisions favors the position of defendant in the instant case; namely that the defense provisions of the law in effect at the time of suit should apply, and the 1986 Qui Tam amendments should not be applied retroactively to eliminate those defenses.

Under the "First Rule of Construction" legislative changes are generally addressed to the future, not to the past, and retroactive application will not be given to a statute or amendment which interferes with existing rights.

Plaintiff argues that courts frequently apply the law in effect at the time of rendering their decision, particularly with respect to remedial statutes. The decisions of the Supreme Court, however, hold that retroactivity should not

be applied when important substantive rights would be destroyed.

Winfree v. Northern Pacific Railway Company, 227 U.S. 296 (1913), is the oldest relevant Supreme Court decision on this issue. Its facts are very similar to those of the present case.

In *Winfree*, the plaintiff's decedent was killed in a railway accident and there was a suit for wrongful death. The subsequent Employer's Liability Act of 1908, took away material defenses of the railway. The Supreme Court held that the statute could not be given retroactive effect if material defenses would be destroyed. The Supreme Court said with respect to the new legislation:

> It . . . takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it, and we may quote . . . "It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available . . ." Such a statute under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.

Winfree v. Northern Pacific Railway Company, 227 U.S. at 302.

The Supreme Court in *Winfree* went on to discuss the limited exception of remedial statutes.

> Plaintiff to support his contention that the act of Congress has retroactive operation, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them,

> it is contended, to the past as well as to the future. The Court of Appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application were "such as were intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof." It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required.

Id. at 301.

Winfree is seventy four years old. Nevertheless, its reasoning appears in accord with the most recent Supreme Court holdings. Under *Winfree*, the loss of material defenses to the defendant would clearly mandate against a holding of retroactivity.

In *Greene v. United States*, 376 U.S. 149 (1964), the court reiterated the very limited application of retroactivity. In allowing a plaintiff to recover lost earnings under an administrative regulation which had subsequently been superseded, the Supreme Court said at 160 that "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . (and) . . . a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislation."

There is nothing in the legislation before this court which indicates manifestly that the Qui Tam provisions are to be

given a retrospective effect. The legislation is silent on the issue of retroactivity.

Plaintiff relies heavily upon *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). There, plaintiffs engaged in extensive litigation with the School Board concerning school desegregation. At the time plaintiff prevailed, there was no provision for attorney fees. The following year, however, Congress passed the Education Amendments of 1972, which provided for attorney fees.

The Supreme Court allowed retroactive application of this provision. It held that, particularly in situations where the statute is remedial in nature, the statute should be given effect with respect to pending litigation unless there is some clear intent not do to so. The court did say, however, that it would not give retroactive application when to do so would infringe upon or deprive a person of a right that had matured or become unconditional. *Id.* at 720.

In *Bennett v. New Jersey*, 470 U.S. 632 (1985), however, the court once again demonstrated how narrowly retroactivity would be applied. There, New Jersey had misused funds it received for public schools under a 1965 law. It sought to have a more lenient 1978 law applied retroactively to the earlier misuse. New Jersey relied on *Bradley*, in support of retroactivity.

The Supreme Court disagreed with New Jersey and held that the 1978 law should not be applied retroactively. It noted that in *Bradley*, the court held that a changed law should not interfere with a right which had matured or become unconditional. The Supreme Court added in *Bennett* that statutes affecting substantive rights are presumed to have only prospective effect. *Bennett* at 639.

Plaintiff urges the court to finds [*sic*] that the present statute is remedial in nature. With respect to *Bennett*, plaintiff further maintains that affirmative defenses on the

part of defendant are not the type of substantive rights which the Supreme Court intended to protect.

Griffon v. United States Department of Health and Human Services, 802 F.2d 146 (5th Cir. 1986), is also very much on point with respect to this action. It too involved false claims to the government, although under a different law. The Fifth Circuit, relying on the First Rule of Construction, held that a civil fraud law could not be applied retroactively to acts of medicaid fraud committed before the effective date of the statute. The court noted this was particularly applicable where Congress was silent on intent.

Plaintiff maintains that the above cases all involved substantive rights and the affirmative defenses in the present case are merely procedural. It cites many examples of procedural rights. Changing the burden of proof can be procedural. *See United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977). A shift in a forum for deciding a case can be procedural. *Hallowell v. Commons*, 239 U.S. 506 (1916). Providing in a statute for the recovery of non-fraudulent overpayment of food stamps by reducing future allotments has been held procedural. *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985). It further appears procedural changes, at least in certain instances can be applied retroactively.

This court, however, cannot agree with plaintiff that the affirmative defenses in this case were purely procedural rights. These defenses are material to defendant's case on the merits of this law suit. That these were the sort of rights intended to be protected from retroactive changes in law, was recognized as far back as *Winfree v. Northern Pacific Railway Company*, 227 U.S. at 302. No subsequent case, either expressly or by implication, has taken away those rights.

Plaintiff makes much of the point that defendant had no right to defraud the United States. This is true. What plaintiff fails to recognize, however, is that by the very defenses of the prior statute, defendant FMC may argue that it had acted properly. By disclosing the pertinent information to the government, FMC, under the law in existence at the time, would have foreclosed any claim based on that information.

Nor does *Bradley* require a different result. In that case, the subsequent law created a right to attorney fees. While the knowledge that it might be subjected to fees might have acted as a deterrent to the *Bradley* defendant, the change in law otherwise had no impact on its actions. Under either law, the *Bradley* defendant knew it was liable for its acts of discrimination. Here, however, defendant might well have believed, in reliance on the old statute, that disclosure of information to the United States would prevent any claim being raised on that issue. This is quite different from the mere creation of an additional remedy.

Plaintiff urges the court to find that, because the changes in the law were remedial, retroactive application should be applied. This must be balanced, however, with the rights which would be taken away by such application. *Bradley v. School Board of the City of Richmond*, 416 U.S. at 720. In the absence of clear congressional intent, *Greene v. United States*, 376 U.S. at 160, the court will not find provisions that destroy such rights to be retroactive.

Based on the above authorities, the court finds that the provisions of the 1986 amendments to the Civil Fraud Claims Act, eliminating or weakening former defenses, must be held affect [*sic*] substantive rights, and cannot therefore, in the absence of express or clearly implied congressional intent, be applied retroactively to cases filed before the amendments took effect.

THE LEGISLATIVE BACKGROUND

The False Claims Amendments Act of 1986, contains no express provision as to whether it is intended to be retroactive or not. The committee report contains no statement one way or the other. In the absence of any such guiding statements, the parties have drawn different conclusions with respect to the most reasonable intent of Congress.

Plaintiff points out that at the time Congress enacted the 1986 civil fraud amendments, it also adopted three other pieces of legislation dealing with fraud, namely, (i) the Program Fraud Civil Remedies Act of 1986 (Pub. Law 99-509); (ii) The Anti-Kickback Enforcement Act of 1986 (Pub. Law 99-634); and (iii) the Department of Defense Authorization Act (Pub. Law 99-145). All three laws were made specifically applicable to conduct or claims submitted *after* the effective date of the statute. The Civil Fraud Amendments contain no such provisions. Therefore, plaintiff maintains that it is implied that such amendments were intended to have retroactive effect.

It is far from clear, however, that the court can imply that a statute is retroactive simply because it says nothing while other contemporary statutes were made expressly prospective. The First Rule of Construction, and the above cited cases state clearly that, in the absence of express Congressional intent, retroactivity should not presumed. Some more definite indication of intent than the mere failure to act, appears necessary. To rule otherwise might ascribe an intent to Congress that is not correct. There is no indication that, contrary to all precedent, Congress would expect a court to make such a presumption.

The United States also points out that there are Qui Tam provisions in the amendments which could not be applied retroactively to already existing plaintiffs. For example, the amendments provide that when a Qui Tam suit is filed, it

shall be sealed and held in camera for 60 days before being served on defendant. Obviously, this and other physically impossible provisions could not be applied retroactively. It would seem absurd that certain Qui Tam provisions could be retroactively applied to block a defense of defendant when others clearly must operate prospectively only. Therefore, it would appear the Qui Tam provisions are not intended to be retroactive.

At this time, only the Qui Tam provisions are before this court. The United States urges this court not to extend its ruling beyond the scope of these provisions and the court has no intention of doing so. It remains unsettled at this time whether other of the amendments will be applied retroactively. Plaintiff urges the court to consider the entire statute. He claims that to segment the new statute would be contrary to Congressional intent. The court declines, however, to make such a broad ruling, on issues that are not before it by this suit.

In conclusion, the court finds that the defense provision of the Civil False Claims Act is applicable to this case. The 1986 amendments should not be given retroactive effect. Neither the weight of authority nor the legislative background of the Qui Tam provisions support such retroactive application.

DATED: 9 8 87

/s/

WILLIAM A. INGRAM
United States District Judge

APPENDIX D

No. 94-55578
No. 94-55638

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. HYATT, aka, BRIAN
Plaintiff-Appellant.

UNITED STATES OF AMERICA, ex rel.
MICHAEL A. (BRIAN) HYATT and JOHN W. KING,
Plaintiff,

v.

NORTHROP CORPORATION,
Defendant-Appellee.

ORDER
DC NO. CV-86-06437-KN

The panel has voted to deny appellee's petition for rehearing[.] Judge T.G. Nelson and Judge Kleinfeld vote to reject the suggestion for rehearing en banc and Judge Wilken so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STAMPED: FILED
MAY 28 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX E

UNITED STATES CODE (1985 EDITION)

TITLE 31. MONEY AND FINANCE
SUBTITLE III — FINANCIAL MANAGEMENT
CHAPTER 37 — CLAIMS
SUBCHAPTER III — CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

(b)(1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure. The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government —

(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

(B) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

(c)(1) If the Government proceeds with an action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(d) The Government is not liable for expenses a person incurs in bringing an action under this section.

APPENDIX F

UNITED STATES CODE (1995 EDITION)

TITLE 31. MONEY AND FINANCE
SUBTITLE III — FINANCIAL MANAGEMENT
CHAPTER 37 — CLAIMS
SUBCHAPTER III — CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) Responsibilities of the attorney general.

The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the

complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person

proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable

attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive

branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses.

The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.

In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Supreme Court, U.S.
FILED
SEP 21 1996
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No. 96-17

In The

Supreme Court of the United States

October Term, 1996

NORTHROP GRUMMAN CORPORATION,

Petitioner,

v.

UNITED STATES ex rel. MICHAEL A. HYATT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a statutory amendment which is enacted while a lawsuit is pending, and which affects the jurisdictional authority of the trial court without affecting the substantive rights, duties and liabilities of the parties, is to be applied in keeping with this Court's decision in *Landgraf v. USI Film Products, et al.*, 522 U.S. 244 (1994).

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INTRODUCTION

In its Petition for Writ of Certiorari Northrop Grumman Corporation ("Northrop") requested the Court to consider its petition in conjunction with the petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340, wherein petitioner Hughes Aircraft had raised a number of issues concerning the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730, including the question of retroactivity raised herein by Northrop. On October 15, 1996, this Court granted certiorari in *Schumer* as to certain issues only, but did include the jurisdictional question of retroactivity. In light of this decision, the issue raised by petitioner Northrop is already before the Court and will no doubt be thoroughly briefed in the *Schumer* appeal. Nevertheless, sound authority supported the reasoning of the Ninth Circuit Court of Appeals decisions in both *Schumer* and in *United States ex rel. Hyatt v. Northrop Corporation*, 80 F.3d 1425 (9th Cir. 1996). As discussed below, the Ninth Circuit's rulings were entirely in keeping with this Court's decision in *Landgraf v. USI Film Products, et al.*, 511 U.S. 244 (1994). This conclusion, moreover, was the expressed opinion of the Solicitor General of the United States as set forth in the amicus brief filed in *Schumer* at the invitation of this Court.

ARGUMENT

I. THE POSITION OF THE UNITED STATES AS STATED IN *SCHUMER* SUPPORTS THE NINTH CIRCUIT'S RULING IN *HYATT* AS WELL.

At the close of its Petition for a Writ of Certiorari, Northrop Grumman Corporation ("Northrop") explicitly requested that its petition be considered in conjunction with that of the petitioner in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 116 S. Ct. 1845 (1996) (No. 95-1340). Consequently, the position asserted by the Solicitor General in the amicus brief for the United States filed in *Schumer* certainly should be considered in this context.

With respect to the retroactivity issue, the Solicitor General made three cogent arguments, all in favor of the propriety of the Ninth Circuit's reasoning in *Schumer* and, by implication, the decision in *Hyatt* as well.

First, the Solicitor General noted that both "the current Section 3730(e)(4) and its predecessor version have governed the jurisdiction of the district court rather than the substantive rights and obligations of the parties," and cited in support the decisions in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 551 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993); and *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504, 506 & n. 9 (7th Cir. 1989), cert. denied, 494 U.S. 1025, 1026, 1027 (1990). Thus, it is the position of the United States, the real party in interest in any *qui tam* case under the False Claims Act, that the replacement of former Section 3730(b)(4) with current

Section 3730(e)(4), "neither prohibited previously lawful conduct nor increased the penalties for violations" and therefore "did not alter the existence or extent of petitioner's liability to the government," but rather "simply expanded the circumstances under which *qui tam* relators may file suit to enforce that liability." (Brief of United States, Amicus, in *Schumer*, 8)

As the Solicitor General pointed out, the reasoning of the Ninth Circuit in *Schumer* was entirely consistent with the principles stated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), wherein this Court had particularly noted that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed" (*id.* at 274), and where Justice Scalia further noted in his concurring opinion this Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction." *Ibid.* at 292. Because the amended provision governs the jurisdiction of the district court without altering the substantive rights, liabilities or duties of the defendant, the decision on retroactivity in both *Schumer* and *Hyatt* was manifestly in keeping with the principles stated in *Landgraf*, as the Solicitor General likewise concluded.

The Solicitor General's second argument in *Schumer* addressed one of the principal points also raised by petitioner Northrop herein, the purported "conflict" between the Sixth Circuit's decision in *United States v. TRW, Inc.*, 4 F.3d 417, 422-423 (6th Cir. 1993), cert. denied, 114 S. Ct. 1370 (1994), and the Ninth Circuit's approach to the retroactivity issue. The position of the United States, however,

is that there simply is not "an irreconcilable circuit conflict on this question," since *TRW* pre-dated this Court's decision in *Landgraf* such that there is no basis for concluding that Sixth Circuit, if called upon to reconsider the question, would adhere to its previous ruling. Significantly, the 1993 decision in *TRW* failed to even consider whether Section 3730(e)(4) was a jurisdictional provision, which was a consideration which, after *Landgraf*, played a significant role in the Ninth Circuit's decisions both in *Schumer* and here.

The Solicitor General's third and final argument on this score was an eminently practical one:

> The effective date of the statutory amendment at issue here is October 27, 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. The longest statute of limitations under the FCA, including equitable tolling, is ten years. 31 U.S.C. § 3731(b)(2). As of October 27, 1996, new cases involving claims arising before the passage of the 1986 amendments will be barred by the statute of limitations. Even if a square circuit conflict existed, the question presented therefore is not of sufficient continuing importance to warrant this Court's review.

(Brief of United States, Amicus, in *Schumer*, 10)

In summary, the stated position of the United States on the retroactivity issue in *Schumer* is that the Ninth Circuit's approach is entirely in keeping with *Landgraf*, that the purported circuit conflict is of dubious significance and that even assuming such a conflict exists in the abstract, the inevitable operation of the applicable statute of limitations will, in a matter of days, render this dispute

largely an academic question in any event. Under these circumstances, the Solicitor General recommended denial of the petition in the *Schumer* action. Since petitioner herein specifically invited the Court to consider the then anticipated amicus brief by the Solicitor General in *Schumer* in the context of this petitioner, Northrop should not be heard to complain now that the position of the United States as articulated in the Solicitor General's brief squarely supports the decisions and reasoning of the Ninth Circuit in both *Schumer* and *Hyatt*.

II. THE NINTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LANDGRAF*.

In *Landgraf* this Court cautioned that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task. . . . A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 268-269 (citation omitted). Petitioner Northrop presents just such a simplistic mechanical analysis, and one which ignores both the fundamental reasoning of *Landgraf* and the particular features of *qui tam* litigation under the False Claims Act which bear directly on this analysis.

As petitioner Northrop is well aware, in any *qui tam* action under the FCA, the United States government is the real party in interest. See *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th Cir. 1992). Indeed, one of the reasons the constitutionality of the 1986 amendments to the *qui tam*

provisions of the FCA was so hotly debated in the decade following enactment was because numerous defendants contended that a *qui tam* plaintiff lacked sufficient standing to pursue such civil prosecution. Over the years, however, federal courts at the trial court and appellate level articulated the relationship between the United States and a *qui tam* plaintiff as one between the real party in interest, the government and an authorized agent or assignee, the relator, whose standing to sue is granted by and at the discretion of Congress, but who serves in the capacity of one seeking redress for an injury done to the United States itself and not to the relator personally. See *United States ex rel. Kelly v. Boeing Company*, 9 F.3d 743, 747-749 (9th Cir. 1993).

The unique features of *qui tam* litigation simply cannot be ignored in the context of the retroactivity analysis without running afoul of this Court's statement in *Bradley v. School Board of Richmond*, 416 U.S. 696, 717 (1974) that the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law upon those rights must be addressed in the retroactivity context. *Landgraf* certainly did not overrule or undermine this earlier pronouncement in *Bradley*, but instead reaffirmed *Bradley's* essential holding that the law in effect at the time the court renders its decision must be applied unless to do so would result in "manifest injustice," in other words, unless such application would operate to affect the *substantive rights of the parties. Landgraf*, 511 U.S. at 278-279.

Landgraf clarified that a change in law has such a substantive effect where its application would "impair rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 522 U.S. at 280. The entire thrust of the reasoning in *Landgraf*, however, was the explicit distinction made between a genuine retroactive effect upon the *substantive* rights, liability or duties of a party, versus an effect which, though it is applied in a case involving conduct antedating the new law's enactment and may very well "upset expectations based in prior law" (*Landgraf*, 511 U.S. at 269) does not affect the substantive rights, liabilities or legal duties involved.

In applying this analysis in the *qui tam* context it is therefore necessary to bear in mind the actual status of relator. Quite simply, a *qui tam* plaintiff has no independent status as a party plaintiff apart from the circumscribed status conferred upon such relator by Congress to act on behalf of the United States government. See *Kelly*, *supra*, 9 F.3d at 748. It is the government's rights, as the real party in interest, which are at issue in any *qui tam* action, whether or not the United States formally intervenes to assume primary control of the litigation. Similarly, the liability in issue is the defendant's liability to the United States, not to the relator himself, just as the duties in question arising from past transactions are those from past transactions between the United States and the defendant, not from transactions between the defendant and the individual relator.

The clear lesson of *Landgraf* is that any change in law will, to some degree, upset expectations based in prior law. *Landgraf*, 511 U.S. at 269-270, n. 24. Consequently, it will always be possible to pose a simplistic and mechanical protest that the challenged law "attaches new legal

consequences" to events completed before the law's enactment. An analytical approach which starts with the broad generality that new legal consequences now attach to some kind of pre-enactment conduct, and which, without further analysis of whether truly substantive rights are involved, then leaps to the conclusion that therefore the new law *necessarily* has an impermissible retroactive effect is precisely the kind of reasoning rejected in *Landgraf* as simplistic and mechanical. It is ultimately a useless approach, since the premise applies so universally to all new enactments of law that the argument proves everything and nothing simultaneously. This is, however, the very analysis presented in Northrop's petition.

Northrop contends that the conduct in issue is "disclosure of information to the government" and that the "important legal consequence" of the amended provision is that whereas under prior law such disclosure preempted a *qui tam* action, now that is no longer necessarily so. (Pet. Br. 8-9) Then, without further ado, Northrop concludes that, "This analysis makes clear that the amended § 3730 would have a retroactive effect in the instant case." (Pet. Br. 9) Northrop therefore skirts entirely the critical question of what bearing the conduct it claims to be in issue, i.e., the relator's disclosure of information to the government, has upon the *substantive* rights, liabilities or duties of the actual parties, the United States and Northrop itself.

Respondent Hyatt submits that Northrop's failure to squarely address this central question is due to petitioner's apparent inability to overcome the cogent reasoning of the Ninth Circuit's ruling that there was no such

substantive effect here. Northrop attacks the Ninth Circuit's decision on two grounds, starting with the circuit court's conclusion that the amended law in no way altered Northrop's underlying liability. Petitioner contends that:

> This argument is flatly inconsistent with *Landgraf*, which makes clear that an alteration of the underlying substantive obligation is not the only way in which a statute may have a retroactive effect. Such an effect exists if application of the statute would 'impair rights a party possessed when he acted, increase a party's liability for past conduct, *or* impose new duties with respect to transactions already completed.' . . . Thus, even if the underlying obligation is not altered, a new statute will still have a retroactive effect if it increases a party's liability for past conduct or impairs a party's pre-existing rights.
>
> (Pet. Br. 10-11)

Northrop then argues that by "reviving a barred cause" a "complete defense" previously available to Northrop was eliminated "thereby impairing Northrop's pre-existing rights and increasing its liability." (Pet. Br. 11) In a footnote on the same page (fn. 5) Northrop contends that this result is "no less retroactive . . . than the revival of a claim barred by the defense of limitations" and then concludes that it was therefore deprived of a material defense which did more than merely resist the remedy, but actually disproved the action. (Pet. Br. 12, relying upon *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 301-02 (1913).)

In each particular of this argument, Northrop is flatly wrong. Contrary to Northrop's assertion, the Ninth Circuit clearly considered each of the three possible substantive areas set forth in *Landgraf*, including impairment of

any rights, the factor of increased liability and the possible imposition of new duties. *Hyatt*, 80 F.3d at 1428. Relying upon its earlier decisions, however, the *Hyatt* court ruled that the amended provision neither impaired any rights the defendant previously possessed, *nor* increased liability for past conduct, *nor* imposed any new duties upon defendant which it did not already bear. Furthermore, the Ninth Circuit specifically noted and relied upon its earlier decision in *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995) wherein it was held that the amendment does not "infringe on the substantive rights of the defendant." The Ninth Circuit likewise reiterated its explicit rejection of the argument that the amendment eliminated a material defense, as earlier stated in *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995). See *Hyatt*, 80 F.3d at 1429. Thus, any suggestion that the Ninth Circuit failed to consider these various issues and instead narrowly limited its review to the question of increased liability is readily disproved by reference to the Ninth Circuit's decision itself.

Additionally, however, it is apparent that in reaching its conclusions on these various matters, the Ninth Circuit followed, rather than departed from, the prescribed approach mandated by *Landgraf*. The Ninth Circuit's approach took into account the actual relationship between the real party in interest, the United States, the status of the relator vis-a-vis the United States, and the resulting relationship between the real party in interest's rights and the rights, duties, and possible liability of the defendant. It is this primary and fundamental analysis

which compelled the conclusions reached by the Ninth Circuit on these discrete issues.

Thus, the right of the United States to performance of contractual and other obligations free from fraud is established in 31 U.S.C. § 3729, and elsewhere in other statutory provisions but, *not* in the *qui tam* provisions of § 3730. Similarly, the liability of a defendant for fraud against the federal government arises from the substantive provisions of § 3729, not § 3730, just as the defendant's duties towards the government arise from contractual, statutory and regulatory contexts *other than* the procedural provisions of § 3730.

The United States furthermore has the right to designate those individuals who are authorized to act on its behalf, whether such individuals do so in the capacity of a Department of Justice attorney or as a private citizen whose authority is derived from a direct grant of standing by Congress. The defendant, however, simply has no "right" to choose whether its alleged wrongdoing will be addressed by one of the "regular troops" of the DOJ[1] versus a private citizen acting as a relator, any more than any defendant has a "right" to choose which of a number of specific government employed attorneys will be responsible for representing the government's interests in a given case. Consequently, because a defendant has no "right" to select between and among various individuals acting as agents for the United States, a provision such as 31 U.S.C. § 3730(e)(4) which alters or expands the pool of potential authorized agents in this regard simply does not

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[1] See *Milam, supra*, 961 F.2d at 49.

implicate a vested or substantive, right. Furthermore, no "material defense" which actually "disproved the right of action," was eliminated when Congress enlarged the pool of available individuals authorized to act on the government's behalf. A "material" defense disproves liability. The amendments to 31 U.S.C. § 3730 merely affected who might represent the government's interest, not what conduct was actionable.

Northrop's complete failure to address these issues head on necessarily infects its second attack on the Ninth Circuit's ruling. In essence, Northrop complains that the Ninth Circuit side-stepped the pertinent inquiry by holding that the amendments were jurisdictional in nature, without recognizing that "what matters under *Landgraf* is not whether Congress used the magic word 'jurisdiction'; what matters is whether the statute merely regulates the authority of particular courts or whether it also creates or destroys substantive rights." (Pet. Br. 14) This is indeed an ironic assertion, since the *Hyatt* decision and the line of authority preceding it dealt explicitly with the issue of whether any *substantive* right was affected by the amended law, while it is Northrop's own petition which is notably devoid of anything more than conclusory repetitions of the same arguments considered and rejected time and again in those thoughtfully reasoned appellate decisions.

The Ninth Circuit did not merely conclude, *ab initio*, that the provision was jurisdictional and that no further analysis was therefore necessary, but rather first concluded that no substantive rights, duties or liabilities were implicated and *therefore* concluded, as it had in

Schumer, that because no substantive interest was implicated, the normal "presumption that jurisdictional provisions will be applied retrospectively" had not been rebutted. *Hyatt*, 80 F.3d at 1429. This was not only generally in line with the approach expressed in *Landgraf*, but strictly in keeping with the very analysis mandated therein.[2] Thus neither of Petitioner Northrop's attacks upon the Ninth Circuit's reasoning withstand scrutiny.

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[2] Northrop's contention that the amendments to the FCA, unlike the Civil Rights Act, must stand or fall collectively on the retroactivity issue, rather than undergoing a discrete examination depending upon which provision is at issue, appears to be more of an afterthought than an argument. Apparently the only support for this position Northrop could find was in the papers filed in the case below by the government years ago and only shortly after the FCA was amended. Of course, the current position of the government is quite different, as is demonstrated by the recent amicus brief filed by the Solicitor General at the express invitation of this Court in the *Schumer* appeal. The approach of a section-by-section analysis need not be deemed a "per se" requirement in order for common sense alone to demonstrate that where different sections in fact implicate different concerns, some procedural, some substantive, an unthinking requirement that all provisions necessarily stand or fall together runs afoul of *Landgraf*'s essential precepts. Furthermore, in this instance there is nothing in either the statutory language overall or in the legislative history which suggests that Congress intended the retroactivity of any one subsection to determine that of all others. On the contrary, to the extent that any "compromise" can be discerned, it can be equally argued that the careful accommodations made *within* 31 U.S.C. § 3730(e)(4) represent Congress' balancing of the competing interests between expanded *qui tam* participation and the danger of parasitic suits which bring no new information to light, such that no further "compromise" need be judicially imposed.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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No. 96-17

In the Supreme Court of the United States

OCTOBER TERM, 1996

NORTHROP GRUMMAN CORPORATION,
Petitioner,
v.
UNITED STATES EX REL. MICHAEL A. HYATT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

In his Brief in Opposition, respondent Hyatt acknowledges that this Court has granted certiorari in *Hughes Aircraft Co. v. United States ex rel. Schumer,* No. 95-1340, in order to review, *inter alia,* the very same "question of retroactivity raised herein by Northrop." Opp. 1. Because, as respondent concedes, "the issue raised by petitioner Northrop is already before the Court," *id.,* the proper course is to defer consideration of the instant petition pending this Court's decision in *Schumer.* After the opinion in *Schumer* is issued later this Term, the petition in this case should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Schumer.*

A. The Petition in This Case Should Be Held Pending This Court's Decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (cert. granted, Oct. 15, 1996)

In its petition in this case, *see* Pet. 19-20, Northrop specifically noted that the question whether the 1986 amendments to the False Claims Act ("FCA") apply retroactively also was presented by the then-pending petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340. The petitioner in *Schumer* likewise observed that the retroactivity issue was presented in both cases, noting in its response to the Solicitor General's *amicus curiae* brief opposing a grant of certiorari in *Schumer* that "[t]he retroactivity issue is also presented in another pending petition, *Northrop Grumman Corp. v. United States ex rel. Hyatt*, No. 96-17 (filed July 2, 1996)." Supp. Br. for Hughes Aircraft Co. in *Schumer*, No. 95-1340, at 7 n.2.

On October 15, 1996, this Court granted review in *Schumer*, "limited to Questions 1 and 2 presented by the petition." 65 U.S.L.W. 3292. Question 1 in *Schumer* includes the issue of the retroactivity of the 1986 amendments to the FCA. *See Schumer* Pet. 9-11; *Schumer* Opp. 2-5; *Schumer* Rep. Br. 1-2; U.S. Br. in *Schumer* at 7-10; Supp. Br. in *Schumer* at 7. Indeed, respondent concedes that the question presented in this case raises the identical retroactivity issue upon which certiorari has been granted in *Schumer*. Opp. 1.

Where, as here, the petition raises a question that this Court has elected to decide on the merits in another case, the appropriate course of action is to hold the petition pending the decision in that other case.[1] *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (noting that "another

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[1] In his Opposition, respondent Hyatt repeats at length the Government's arguments, made unsuccessfully in its *amicus curiae* brief in *Schumer*, that the retroactivity issue is not worthy of plenary review in

petition for certiorari" raising the same issue was "being held pending disposition of this case"); *Winfield v. Kaplan*, 114 S. Ct. 2783, 2783 (1994) (Scalia, J., dissenting) ("When [the] petition [in *Winfield*] first came before us for consideration, we voted to defer disposition pending the announcement of our judgment in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), No. 93-880, because of the similarity of the issues presented in the two cases."); *see generally* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* 243-44 (7th ed. 1993).

Accordingly, the petition in this case should be held pending the announcement of this Court's decision in *Schumer*. After that judgment is announced, this Court should grant the petition in the instant case, vacate the Ninth Circuit's judgment, and remand the case to that court for reconsideration in light of this Court's decision in *Schumer*. *See Lawrence v. Chater*, 116 S. Ct. 604, 606-07 (1996) (per curiam) (stating that "the GVR order" has "become an integral part of this Court's practice"); *Stutson v. United States*, 116 S. Ct. 611, 613 (1996) (Scalia J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided") (emphasis in original).

If this Court holds in *Schumer* that the 1986 amendments to 31 U.S.C. § 3730 do not apply retroactively to a case in which the government acquired its knowledge of the allegations before the effective date of the amendments (as Northrop has urged in its petition here), then the Ninth Circuit's judgment here cannot stand and a GVR certainly would be necessary in order to "alleviat[e] the '[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant plenary review of all pending cases raising

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this Court. Opp. 1-5. These arguments are entirely moot in light of this Court's decision to grant certiorari on this issue in *Schumer*.

similar issues." *Lawrence*, 116 S. Ct. at 606-07 (quoting *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982)).

Even if the Court holds that the amended FCA may be applied retroactively on the facts of *Schumer*, a GVR likely will be required in this case. The complaint here (unlike the one in *Schumer*) was filed *before* the effective date of the 1986 amendments, making this case an even stronger candidate for non-retroactivity than is *Schumer*. *See* Pet. 20 n.14. Thus, even if this Court were to hold that the amended § 3730 may be applied under the facts in *Schumer*, the Court nonetheless should GVR this case in order to allow the Ninth Circuit to consider whether this Court's discussion and analysis of the retroactivity question in *Schumer* requires that the amended statute not be applied to cases filed *before* its enactment.[2]

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[2] As noted in Northrop's petition, the amended *qui tam* provisions of the FCA are not severable from one another, and because the new under seal filing requirements cannot be applied retroactively to a suit filed *before* the enactment of the amended § 3730, no portion of that amended statute may be applied retroactively. Pet. 15-16. The Ninth Circuit reached a contrary conclusion only because of its erroneous view that *Landgraf requires* a subsection-by-subsection retroactivity analysis. Pet. App. 9a-10a. Tellingly, respondent Hyatt expressly disavows this *per se* approach, *see* Opp. 13 n.2, but he is unable to offer any persuasive alternative rationale for the Ninth Circuit's decision. Respondent suggests that a subsection-by-subsection analysis is appropriate *whenever* a statute contains some provisions that are "substantive" and some that are "procedural," *id.*, but this approach ignores that fact that the severability of a statute's provisions, for retroactivity purposes, is ultimately a question of congressional intent. *Landgraf*, 114 S. Ct. at 1505. Here, the available evidence demonstrates that Congress intended the amended § 3730 to apply, at a minimum, only to suits filed after the date of enactment of that statute. Pet. 15-16 & n.9.

B. Respondent's Arguments Confirm the Ninth Circuit's Error in This Case

Because the retroactivity issue will be "thoroughly briefed" for this Court in *Schumer* (as respondent notes, *see* Opp. 1), it is unnecessary to address at length respondent's arguments in defense of the merits of the Ninth Circuit's retroactivity analysis in *Schumer* and *Hyatt*. A brief examination of those arguments in any event confirms the Ninth Circuit's error in this case.

The Ninth Circuit held that the amended § 3730 would not have a retroactive effect because it would not alter the contractor's underlying liability to the government. Pet. App. 7a. In its petition, *see* Pet. 10-12, Northrop noted that this argument cannot be squared with *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), both of which clearly hold that a statute may be deemed to have a retroactive effect even if it does not "alter the normative scope" of the underlying legal obligation. *Id.* at 1515. *Landgraf* acknowledged that a statute will be deemed to have a retroactive effect *not only* if it "impose[s] new duties with respect to transactions already completed," *but also* if it would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Landgraf*, 114 S. Ct. at 1505.

Respondent argues that the Ninth Circuit's decision is consistent with *Landgraf* because the Court of Appeals recited each of the above-quoted phrases in its opinion. Opp. 9-10. But the Ninth Circuit's purported *application* of the *Landgraf* criteria suffered from precisely the same error that respondent commits in his Brief in Opposition: both acknowledge and quote the several phrases from *Landgraf*, but then proceed to collapse them into a single category. According to respondent, the amended § 3730 would have a retroactive effect *only* if it altered "the defendant's liability to the United States," Opp. 7, or "the right of the United

States to performance of contractual and other obligations free from fraud," *id.* at 11. *See also id.* at 8 (question is whether "truly substantive rights are involved"); *id.* at 12 (statute has retroactive effect only if it redefines "what conduct was actionable"). This analysis, which mirrors the Ninth Circuit's treatment of the issue, overlooks the fact that the amended § 3730, if applied retrospectively, would plainly eliminate Northrop's *substantive* right to obtain complete dismissal of this *qui tam* suit based on Northrop's earlier disclosures of information to the Government. *See* Pet. 8-12.

That the decision below cannot be reconciled with *Landgraf* also is illustrated by respondent's direct attack on the legal standard set forth by this Court in that case. In *Landgraf,* this Court stated that a statute has a retroactive effect if it "attaches new legal consequences to events completed before its enactment." 114 S. Ct. at 1499. Application of this standard here compels the conclusion that the Ninth Circuit erred: because Northrop's disclosures of information to the government occurred *before* the 1986 amendments, application of the new statute would nullify the immunity from *qui tam* suits that was triggered by those disclosures. Respondent makes absolutely no effort to dispute this point; instead, he simply attacks as "simplistic and mechanical" the underlying premise that a statute has a retroactive effect if it attaches new legal consequences to pre-enactment conduct. Opp. 8. But because that is the standard established in *Landgraf,* respondent's argument is nothing less than a frontal assault on *Landgraf* itself.[3]

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[3]Respondent simply ignores the fact that application of the amended § 3730 would significantly alter the government's rights *vis-a-vis* the relator. *See* Pet. 12 n.6.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (cert. granted, Oct. 15, 1996). After this Court's opinion in *Schumer* is issued, the petition in this case should be granted, the judgment of the Ninth Circuit should be vacated, and the matter should be remanded to that court for reconsideration in light of this Court's decision in *Schumer*.

Dated: November 4, 1996

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